

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 Case No. 06-2-0006

4 In the Matter of the Petition of Bert Loomis
5 for a Declaratory Ruling
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**DECISION ON PETITION FOR
DECLARATORY RULING**

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10 This Matter comes before the Board upon a petition for declaratory ruling filed on
11 February 27, 2006. Petition of Bert Loomis for a Declaratory Ruling. The petition was filed
12 pursuant to WAC 242-02-910. Petitioner Loomis seeks a nonbinding declaratory ruling from
13 the Board on issues concerning master planned resorts authorized under the Growth
14 Management Act (GMA) - RCW 36.70A.360 36.70A.362.
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17 Pursuant to WAC 242-02-920, the Board issued a Notice of Petition for Declaratory Ruling
18 on March 10, 2006. The Notice advises listed persons of the petition and requests further
19 information on any additional persons required by law to be served. It also provides that
20 any interested person may file a response and a brief or memorandum to assist the Board in
21 making a determination whether a declaratory ruling should be issued. Such responses
22 were due March 20, 2006¹. Notice of Petition for Declaratory Ruling.
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25 Three responses were received by the Board: Response of Port Ludlow Associates LLC to
26 Petition of Bert Loomis for Nonbinding Declaratory Ruling; Response of Jefferson County to
27 the Petition for a Declaratory Ruling; and Petitioner's Memorandum in Support of Petition for
28 Declaratory Ruling, Requesting a Hearing and Opportunity to Present Evidence.
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32 ¹ Petitioner's name was initially omitted from the list of persons required by law to be served; when the error
was discovered, Petitioner was given additional time in which to file his brief.

DECISION

Positions of the Parties

Petitioner asks the Board to render a decision on the applicability of the Growth Management Act to a planned project action – a major revision to the Resort Plan for the Port Ludlow Master Planned Resort in Jefferson County. Petitioner's Memorandum in Support of Petition for Declaratory Ruling, Requesting a Hearing and Opportunity to Present Evidence. The approval of the pending major revision to the Resort Plan raises questions, according to Petitioner, concerning the compliance of the master planned resort designation with the Growth Management Act if the major revision is adopted. *Ibid* at 3-4. Petitioner urges the Board to agree to enter a declaratory ruling in this case. Petitioner argues that there is "uncertainty necessitating resolution." *Ibid*. Petitioner alleges that the County and Port Ludlow Associates LLC (Port Ludlow) have argued to the hearing examiner and the superior court that they do not have jurisdiction to determine such questions because questions concerning the applicability of the GMA are solely within the jurisdiction of the growth management hearings boards. James A. Perkins' Declaration Supporting Bert Loomis's Petition at 7. There is an actual controversy, Petitioner points out, and Petitioner will be harmed if the Board does not agree to issue a declaratory ruling in this case because "there is no other entity which has to date said it will address this issue." *Ibid* at 8.

The County argues that the Board should not agree to issue a declaratory ruling in this case because it is an attempt to "entangle" this Board in pending litigation relating to project permit applications. Response of Jefferson County to the Petition for a Declaratory Ruling at 2. The County further argues that there is no actual controversy within the jurisdiction of this Board and so the declaratory ruling would merely be an advisory opinion. *Ibid* at 2-3. A declaratory ruling would impermissibly expand the jurisdiction of the boards, the County asserts, by interjecting the boards into project-level decision-making. *Ibid* at 3. The County argues that the adverse effects of issuing a declaratory ruling far outweigh any adverse

1 effect based on the uncertainty alleged by Petitioner because it would cause GMA decisions
2 to be inserted into the project permit process generally. *Ibid* at 7-9.

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4 Port Ludlow also argues against the Board accepting the petition for declaratory ruling.
5 Response of Port Ludlow Associates LLC to Petition of Bert Loomis for Nonbinding
6 Declaratory Ruling. Port Ludlow points to multiple civil cases pending concerning the major
7 revision. *Ibid* at 4. It argues that if the Board accepted the petition for declaratory ruling, the
8 Board would step outside its authority and pre-empt the authority of the Superior Court, the
9 Shorelines Hearings Board, and the County Hearing Examiner. *Ibid* at 5. Port Ludlow
10 further argues that a decision by the Board is barred by *res judicata* and collateral estoppel
11 because the superior court has already ruled that "RCW 36.70A.362 does not govern
12 project-specific permit decisions." *Ibid*. As the County does, Port Ludlow argues that the
13 GMA does not apply to project level decisions and Port Ludlow additionally argues that the
14 petition for declaratory ruling is defective for lack of a verification of the truth of its contents
15 by the Petitioner. *Ibid* at 6-7.
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19 **Board Discussion**

20 The Board's authority to issue a declaratory ruling is based in the GMA provision that the
21 rules of the Administrative Procedures Act (APA) (Ch.34.05 RCW) apply "except as it
22 conflicts with specific provisions of this chapter". RCW 36.70A.270(7). The APA in turn
23 provides for petitions for declaratory rulings:
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25 Any person may petition an agency for a declaratory order with respect to the
26 applicability to specified circumstances of a rule, order, or statute enforceable by the
27 agency. The petition shall set forth facts and reasons on which the petitioner relies to
28 show:

- 29 (a) That uncertainty necessitating resolution exists;
- 30 (b) That there is actual controversy arising from the uncertainty such that a
31 declaratory order will not be merely an advisory opinion;
- 32 (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any
adverse effects on others or on the general public that may likely arise
from the order requested; and

1 (e) That the petition complies with any additional requirements established by
2 the agency under subsection (2) of this section.
3 RCW 34.05.240(1).

4
5 The Boards' Rules of Practice and Procedure (Ch. 242-02 WAC) include rules for petitions
6 for declaratory rulings. WAC 242-02-910-930. This petition was filed pursuant to those
7 rules.

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9 As a preliminary matter, we note that the jurisdiction of the boards cannot be extended by
10 procedural rules and that RCW 36.70A.270(7) only incorporates the APA rules for "practice
11 and procedure of the boards." RCW 36.70A.280 provides a strict limitation on the authority
12 of the boards:
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14 A growth management hearings board shall hear and determine only those petitions
15 alleging either:

- 16 (a) That a state agency, county, or city planning under this chapter is not in
17 compliance with the requirements of this chapter, chapter 90.58 RCW
18 as it relates to the adoption of shoreline master programs or
19 amendments thereto, or chapter 43.21C RCW as it relates to plans
20 development regulations or amendments, adopted under RCW
21 36.70A.040 or chapter 90.58 RCW; or
22 (b) That the twenty-year growth management planning population
23 projections adopted by the office financial management pursuant to
24 RCW 43.62.035 should be adjusted.

25 RCW 36.70A.280(1).

26 Even though the boards have rules for petitions for declaratory rulings, then, we must be
27 careful not to apply them in ways that exceed the legislative grant of authority to the growth
28 boards.

29 Under the APA, the Board must act within thirty days to: enter an order declaring the
30 applicability of the statute, rule or order to the specified circumstances; set the matter for a
31 hearing; set a time for entry of a declaratory order (within ninety days); or decline to enter a
32 declaratory order. RCW 34.05.240(5).

1 The APA also provides:

2 An agency may not enter a declaratory order that would substantially prejudice the
3 rights of a person who would be a necessary party and who does not consent in
4 writing to the determination of the matter by a declaratory order proceeding.
5 RCW 34.05.240(7).

6 There are, therefore, a number of reasons why the Board should decline to enter a
7 declaratory ruling in this case. First, the Board only has jurisdiction over petitions
8 challenging a GMA action, and project permit approvals are not GMA actions. RCW
9 36.70A.280(a); 36.70A.030(7). Further, there is no GMA action that has been timely
10 appealed in this case. See RCW 36.70A.290(2). Issuance of a declaratory ruling in excess
11 of the Board's statutory authority is reversible error. *W.W.U. v. Washington Fed'n of State*
12 *Employees*, 58 Wn. App. 433, 437, 793 P.2d 989, 1990 Wash. App. LEXIS 254 (Div. II –
13 1990).
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16 Second, two parties whose rights would be affected by a declaratory ruling – the County
17 and Port Ludlow – object to the issuance of a declaratory ruling. RCW 34.05.240(7)
18 appears to require that those parties consent to a declaratory order proceeding.
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21 However, the most important reason, in the Board's view, is that three other tribunals
22 already have accepted review of the decisions to which a declaratory ruling by the Board
23 would apply. Under these circumstances, action by the Board would not resolve uncertainty
24 but likely create it.
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27 Petitioner argues that there is a need for a Board decision on the applicability of the GMA to
28 the permit approvals at issue. However, it is not up to this Board to determine that such a
29 decision would be pertinent or helpful. Such a determination should be made by the tribunal
30 that has the issue before it. The doctrine of primary jurisdiction is instructive in this regard.

31 This doctrine allows a court to defer to an agency if:
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- 1 1. The agency has the authority to resolve the issues that would be referred to it by the
- 2 court;
- 3 2. The agency must have special competence over all or some part of the controversy
- 4 which renders the agency better able than the court to resolve the issues;
- 5 3. The claim before the court must involve issues that fall within the scope of a
- 6 pervasive regulatory scheme so that a danger exists that judicial action would
- 7 conflict with the regulatory scheme.

8 *Jaramillo v. Morris*, 50 Wn. App. 822, 828, 750 P. 2d 1301, 1988 Wash. App. LEXIS 1557
9 (Div. III -1988). These are the circumstances that Petitioner alleges exist here. However,
10 the decision whether to defer to the agency, in this case the Board, rests with the court, not
11 the Board. *Ibid*.

12 ORDER

13 Based on the foregoing, the Board hereby DECLINES to issue a declaratory ruling for the
14 following reasons:

- 15 1) The declaratory ruling requested in this case exceeds the Board's statutory grant of
- 16 authority;
- 17 2) Two of the necessary parties to the declaratory order proceeding object to the Board
- 18 issuing a declaratory ruling;
- 19 3) The issues raised in the petition for declaratory ruling are or have been before other
- 20 tribunals which have not elected to defer to this Board;
- 21 4) The adverse effect of uncertainty on the petitioner does not outweigh any adverse
- 22 effects on others or on the general public that may likely arise from the order
- 23 requested.

24 Pursuant to RCW 36.70A.300 this is a final order of the Board.

25 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
26 of mailing of this Order to file a petition for reconsideration. The original and three
27 copies of a motion for reconsideration, together with any argument in support
28 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
29 original and three copies of the motion for reconsideration directly to the Board, with
30 a copy to all other parties of record. Filing means actual receipt of the document at
31 the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
32 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
decision to superior court as provided by RCW 36.70A.300(5). Proceedings for

1 judicial review may be instituted by filing a petition in superior court according to the
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
3 Enforcement. The petition for judicial review of this Order shall be filed with the
4 appropriate court and served on the Board, the Office of the Attorney General, and all
5 parties within thirty days after service of the final order, as provided in RCW
6 34.05.542. Service on the Board may be accomplished in person or by mail, but
7 service on the Board means actual receipt of the document at the Board office within
8 thirty days after service of the final order. A petition for judicial review may not be
9 served on the Board by fax or by electronic mail.

10 **Service.** This Order was served on you the day it was deposited in the United States
11 mail. RCW 34.05.010(19)

12 ENTERED this 28th day of March 2006.

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15 _____
16 Margery Hite, Board Member

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18 _____
19 Holly Gadbow, Board Member

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21 _____
22 Gayle Rothrock, Board Member